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July 23, 1997

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: In the matter of MCI Telecommunications Corp. Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997, CC Docket No. 97-100.

Dear Mr. Caton:

Enclosed for filing in the above referenced proceeding, please find an original and four comments of the Reply Comments of MCI Telecommunications Corp., and Motion for Leave to File Out of Time. An extra copy has also been included to be file stamped and returned.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Jodie L. Kelley

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
MCI Telecommunications Co., Inc.	)	
	)	
Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 pursuant to §§ 251, 252 and 253 of the Communications Act of 1934, as amended	)	**CC Docket No. 97-100**

REPLY COMMENTS OF MCI

MCI Telecommunications Co. respectfully submits these reply comments in the Matter of MCI's Petition for Expedited Declaratory Ruling (Petition).

MCI's petition, filed in response to passage of the anti-competitive Arkansas Telecommunications Regulatory Reform Act of 1997 (the Arkansas Act), requested this Commission to preempt certain portions of the Arkansas Act that are inconsistent with federal law. A number of commenters, including those representing consumer groups, support MCI's petition, highlighting that the Arkansas Act is "strongly anti-consumer and anti-competitive." Comments of the Competition Policy Institute at -i-. The Arkansas Act is defended by, among others, the incumbent local exchange carrier (incumbent LEC or ILEC) the statute was designed to protect.

The commenters do not make any substantial argument that the Commission lacks authority to issue the relief requested. Section 253 of the Telecommunications Act of 1996 (the

1996 Act or the Act), entitled "Removal of Barriers to Entry," flatly precludes states from imposing any statute or regulation that prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service, and also grants express authority to the Commission to preempt such statutes or regulations "to the extent necessary to correct such violation of inconsistency." §§ 253(a), 253(d).

Contrary to the suggestion of certain commenters, Section 253(a) does not restrict this Commission's preemption authority to only those circumstances in which a state statute actually imposes a legal bar to competitive entry. See Comments of Arkansas Telephone Ass'n at 8-9; Comments of Bell Atlantic/NYNEX at 2. On its face, Section 253(a) preempts a much broader category of state laws or regulations, expressly barring all state statutes or regulations which have the effect of prohibiting entry. The Arkansas Act plainly falls within this category -- it puts potential competitors at a substantial disadvantage in relation to the incumbent telephone provider (thereby effectively preventing them from offering real competition), conflicts with the federal statute designed to open local markets to competition, and protects incumbent monopoly telephone providers from the effects of local competition. Because the Arkansas Act has the "effect of" prohibiting the entry of competing carriers into local markets, this Commission should use its section 253 preemption power to declare those portions of the Arkansas Act identified in MCI's petition preempted.[1]

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[1] Some commenters argue that the Arkansas Act is saved by Section 253(b). See Opposition of Bell Atlantic/NYNEX at 2; Comments of Arkansas Telephone Ass'n at 9. That argument is meritless. First, the Arkansas Act does not fall within the ambit of 253(b). That section only applies to statutes that are necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers. There has been no suggestion that the Arkansas Act is necessary to further any of these goals. And, even if it were, the Arkansas Act would still be preempted. Section 253(d) of the Act gives this Commission the authority to preempt any statute

In addition to violating Section 253, the provisions identified in MCI's petition also are preempted because they conflict with federal law.[2] See, e.g. New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 115 S.Ct. 1671, 1676 (1995); see also Comments of Southwestern Bell Telephone Company (SWBT Comments) at 2 (discussing conflict preemption and citing cases). If the Arkansas Act "actually conflicts with federal law," Schneidewind v. ANR Pipeline, 485 U.S. 293, 300 (1988), it must be preempted. A "direct, facial contradiction between state and federal law is not necessary" to demonstrate that there is an actual conflict. Securities Industry Ass'n v. Connolly, 883 F.2d 1114, 1117 (1st Cir. 1989). Instead, the relevant question is merely whether "the state law disturbs too much the congressionally declared scheme . . ." Palmer v. Liggett, 825 F.2d 620, 626 (1st Cir. 1987).[3]

The Arkansas Act, of course, does present a direct, facial contradiction with the requirements of federal law. In certain cases, the provisions of the Arkansas Act purport to eliminate federal requirements. In other cases, the Arkansas Act utterly changes standards applicable under the federal law, or grafts new requirements onto what are exhaustive

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that violates "subsection (a) or (b)." The Arkansas Act violates both. Subsection (a) is violated for the reasons discussed above, and the Arkansas Act runs afoul of section 253(b) because, as demonstrated in MCI's petition, the Arkansas Act is not competitively neutral as required by section 253(b).

[2] There is no question that the 1996 Act mandates that state regulation be consistent with the Act; section 261(b) allows for the enforcement of prior state regulations, but only if "such regulations are not inconsistent" with the Act, and section 261(c) of the Act allows for new state regulation (such as the Arkansas Act) only if "the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part."

[3] A few commenters suggest that Section 251(d)(3) of the 1996 Act saves the Arkansas Act. These commenters are wrong. Section 251(d)(3) makes clear that only state regulation which is both consistent with the Federal Act and which does not prevent implementation of the 1996 Act survives. 47 U.S.C. § 251(d)(3)(B) and (C). The Arkansas Act fails both tests.

requirements imposed by federal law. There is no question that the Arkansas Act "disturbs too much" the scheme Congress set up in the 1996 Act.

Those commenters defending the Arkansas Act do not seriously attempt to argue that the Arkansas Act and the 1996 Act are consistent. Instead these commenters including, most notably, Southwestern Bell (SWBT), rely almost completely on the argument that preemption is inappropriate because there may be some hypothetical circumstance in which application of federal law and the Arkansas Act would not produce conflicting results. See Comments of SWBT; Comments of Arkansas Attorney General at 2-3 (arguing that MCI has no standing to challenge the Arkansas Act). Thus, for example, the Arkansas Act requires the Arkansas commission to approve an SGAT unless it can demonstrate by clear and convincing evidence that the SGAT violates the requirements of federal law. Federal law, by contrast, requires the Arkansas commission to reject an SGAT unless the proponent of the SGAT demonstrates that it is consistent with federal law. These commenters argue that preemption of this conflicting standard would be inappropriate because MCI has not demonstrated that in every single circumstance in which the "clear and convincing" standard is applied, there would be a different outcome than if the federal standard had been applied.

This argument misconceives the Commission's duty. Critically, to the extent that any state statute or regulation violates 253(a) or (b), Section 253(d) directs the Commission to preempt enforcement of that statute or regulation "to the extent necessary to correct such violation or inconsistency." (emphasis added). Thus, even if it could be demonstrated that some applications of the Arkansas Act would not conflict with the 1996 Act, that would not preclude the Commission from acting on this petition. Indeed, the opposite is true. Congress has made the

express determination that, even if certain applications of state law do not violate §253(a) or (b), the Commission must nonetheless preempt those applications of state law that do. There is no reason why the Commission cannot do so as a categorical matter.

Similarly, it is irrelevant to a conflict preemption analysis that a commenter asserts that it can imagine a case in which the result of application of Arkansas law is not different than the result would have been if the appropriate federal law applied. The relevant question is whether there is an actual conflict between the substantive requirements of federal law and the substantive requirements of state law. There is. The Arkansas statute is clear, and it is clearly in conflict with federal law. The commenters' attempt to obfuscate this obvious fact fails and, with it, the primary defense relied on by the commenters defending the Act also fails.[4] Even if some applications of the state law would not present a conflict, the Commission is obviously authorized to identify those categories of application requiring preemption.

Indeed, for the provisions identified in MCI's petition, the conflict between federal and state law could hardly be more stark. For example, the Arkansas Act's rules on resale flatly prohibit potential competitors from purchasing telecommunications services offered at promotional prices for resale (Section 9(d)), while, in sharp contrast, the Federal Act requires that any telecommunications service be offered for resale, including those offered at promotional rates. See § 251(c)(4); Order at ¶ 948. These provisions are indisputably in direct conflict.

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[4] SWBT's reliance on California Coastal Comm'n v. Granite Rock Co.. 408 U.S. 572 (1987) is utterly misplaced. See Comments of SWBT at 2 & n.6. In that case a claim was made that federal law preempted a state permitting statute. The plaintiff made no effort, however, to identify any actual conflict with federal law, and therefore the question presented to the court was whether a permitting requirement, whatever its scope or content, would necessarily violate federal law. Id. At 579-80. Here, MCI has pointed to specific provisions of the Arkansas statute which squarely conflict with federal law. California Coastal Comm'n is therefore wholly inapposite.

Similarly, the Arkansas statute directs the state commission to add certain costs to the retail rate when setting wholesale discounts (Section 9(g)), while federal law requires wholesale discount rates to be calculated only by subtracting certain costs from the otherwise applicable retail rate. 47 U.S.C. §253(d)(3). A requirement that allows only for subtraction is plainly inconsistent with one that requires addition.

The Arkansas Act's alteration of the federal requirements for approving agreements or Statements of Generally Applicable Terms (SGATs) is similarly indefensible. (§9(i)). There is no question that the state law purports to eliminate several federal requirements. Notably, no party claims, nor could they, that in this respect the two statutes are in harmony. Indeed, as SWBT admits, the Arkansas Act would require approval of SGATs that, under federal law, must be rejected. See SWBT Comments at 7 (noting that the Arkansas Act requires approval even when the federal approval requirements are not met, and further noting that "it is certainly possible to imagine a particular statement of generally available terms that would be approved under the Arkansas Act that might not satisfy the requirements of federal law . . .").

Some commenters also attempt to argue that there is no clear conflict between state law which requires approval of state agreements unless it can be demonstrated by clear and convincing evidence that the requirements of federal law are not met (§9(i)) and federal law which prohibits state commission approval of agreements or SGATs unless the commission finds that the requirements of federal law are met because the end result of the application of the two standards may not in every circumstance be different. 47 U.S.C. § 252(f)(2). While SGATs or agreements may (or may not) someday exist that would satisfy both the federal standard and the wholly different state standard, that does not mean that the two standards are the same or are compatible.

Indeed, it is apparent that the opposite is true: the clear and convincing evidence standard imposed by state law requires the state commission to approve an SGAT or agreement, even if the state commission determines that it is more likely than not that the agreement or SGAT does not meet the requirements of federal law. Unlike a preponderance of the evidence standard, which assumes "that the trier of fact piles up the evidence [on each side] . . . and determines which pile is greater," U.S. v. Montague, 40 F.3d 1251, 1254 (D.C.Cir. 1994), the clear and convincing evidence standard requires the trier of fact "to reach a firm conviction of the truth on the evidence about which he or she is certain." Id. At 224. The Arkansas statute thus requires the state commission to judge every agreement and SGAT under a substantive standard that is different than that contemplated by the Act.

This issue cannot be dismissed as a question of "who 'bears the risk of equipoise.'" SWBT Comments at 8 (citation omitted). "The function of any standard of proof is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" Colorado v. New Mexico, 467 U.S. 310, 315 (1984), quoting In re Winship, 397 U.S. 358, 370 (1970). This is clearly substantive -- "the standard of proof allocates the risk of erroneous judgment between the litigants and indicates the relative importance society attaches to the ultimate decision." Colorado v. New Mexico, 467 U.S. at 316. Congress has determined the relevant importance of the approval process and allocated that risk accordingly. Because the Arkansas Act alters Congress' judgment in every case, imposing a new and different substantive requirement, it cannot be reconciled with federal law.

The same clear and convincing evidence standard is imported into the rural

telephone company exemption requirements (§ 10), and is similarly in conflict with federal law. Additionally, the Arkansas Act imposes a number of requirements related to the exemption of rural telephone companies from the requirement of the Federal Act that go above and beyond those delineated by federal law. (§10). Commenting parties make no serious effort to defend the addition of these requirement.

Nor is any plausible defense made of the Arkansas Act's universal service provisions. For example, no commenting party argues that the portion of the Arkansas Act which guarantees revenues to incumbent LECs, but provides no such guarantee to non-incumbents, is competitively neutral. SWBT resorts to pointing out that, as of today, there are no competitive local exchange carriers competing with ILECs in Arizona and suggests only that this Commission should defer action until a competitor emerges who will be discriminated against under the Arkansas Act. See SWBT Comments at 12. Moreover, although it is clear that states are free to set up their own universal service mechanisms and impose requirements on carriers within their jurisdictions seeking access to such universal service revenues, it is equally clear that these requirements must be consistent with the Act, including the requirement of competitive neutrality. 47 U.S.C. § 214. There can be no plausible argument made that the Arkansas Act is competitively neutral. The Arkansas Act, for example, designates the ILEC as the telecommunications carrier eligible for universal service funding in a given area while requiring other carriers to meet requirements for eligibility which are not imposed on ILECs before they may even petition for eligibility (the grant of which is discretionary) (§5).

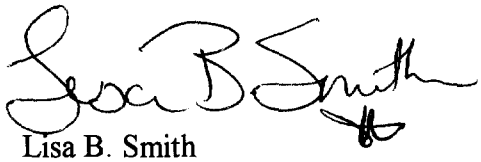
In short, the majority of comments filed by those defending the Arkansas Act attempt to divert the Commission's attention from the flatly contradictory nature of individual

provisions and argue that the Commission should not act because commenters can hypothesize a situation in which application of conflicting requirements might not lead to different results. This is doubtful, but more importantly it is irrelevant. In engaging in preemption analysis, this Commission need not find that there is no conceivable situation in which the result would not be altered. Instead, it need find that there is an actual conflict between federal and state law. Because there undoubtedly is, the Commission should expeditiously grant MCI's petition.

CONCLUSION

For the reasons set out herein, in MCI's petition and in the Comments supporting MCI's petition, the Commission should declare preempted those provisions of the Arkansas Act that are in conflict with the express requirements of the 1996 Act and this Commission's Orders, or that constitute a barrier to entry under section 253 of the 1996 Act.

Respectfully submitted,



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